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IN THE

Supreme Court Of The United States

No._____

RICHARD LAMAR PATTERSON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(a)

REFERENCE TO OFFICIAL REPORT

The opinion sought to be reviewed by the petition for writ of certiorari was rendered by the United States Court of Appeals for the Fifth Circuit, on the 3rd day of October,

1966, in the case of Richard Lamar Patterson versus United States of America, Case Number 23,180, said judgment was rendered against Richard Lamar Patterson and the judgment affirmed the judgment of the United States District Court for the Northern District of Georgia, Gainesville Division. Said judgment of the United States Court of Appeals for the Fifth Circuit has not been reported in an official reporter at this time. A copy of said opinion of the United States Court of Appeals for the Fifth Circuit rendered on October 3, 1966, is appended hereto marked "Exhibit A-1" and is by reference made a part of this petition. A petition for rehearing was denied, without opinion, on November 4, 1966, and is appended hereto marked "Exhibit A-2" and is by reference made a part of this petition.

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled Richard Lamar Patterson versus United States of America, Case Number 23,180, in the United States Court of Appeals for the Fifth Circuit, is dated October 3, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under and by virtue of the Supreme Court Rules, Rule 19 lb, Title 28 U.S.C.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of Federal law in the administration of criminal justice, which, while already settled by this Court, is in direct conflict with prior decisions of this Court, and has, by its decision in the case forming the basis for the petition for writ of certiorari, so far departed from the accepted and prescribed course of judicial proceedings as to require the exercise of this Court's power of supervision.

The United States Court of Appeals for the Fifth Circuit has held in the case here sought to be reviewed, that evidence obtained by Federal Agents, was not an illegal search and evidence obtained by this search was admissible in evidence and admission of such evidence did not violate the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

The said Court also held that evidence was sufficient to warrant the conviction under Title 26 U.S.C.A., Sec. 5601 (a) 1, and Title 26 U.S.C.A., Sec. 5601 (a) 4.

The decision is in sharp conflict and direct conflict with the decisions of this Court in the cases of Johnson versus United States, 68 S. Ct. 367-369; Chapman versus United States, 365 U.S. 607 and 81 S. Ct. 776; United States versus Ramano, 86 S. Ct. 279; Henry versus United States 80 S. Ct. 768; Baysden versus United States, 4 Cir. 271 F. 2d 325, and numerous other decisions of various Circuit Courts of Appeal.

(c)

QUESTIONS PRESENTED

-1-

Does the Fourth Amendment to the Constitution of the United States of America by virtue of the due process clause of the Fourteenth Amendment to the Constitution of the United States of America render inadmissible in a Federal criminal proceeding the procurement of evidence by an illegal search and seizure?

-2-

Does Section 5601 (a) 1 and 5601 (a) 4 of Title 26 U.S.C.A. render a person allegedly in violation thereof whose person was not affirmatively shown to be at a still site, to have unlawfully, willing and knowingly have in his possession, custody and control a still or distilling apparatus set up

without having same registered or given bond as required by law.

(d)

STATUTE INVOLVED

Fourth Amendment to the Constitution of the United States of America:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Title 26 U.S.C.A. 5601 (a) 1:

> "Any person who has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179 (a)."

Title 26 U.S.C.A. 5601 (a) 4:

> "Any person who carried on the business of a distiller or rectifier without having given bond as required by law."

(e)

STATEMENT OF THE CASE

At the October Term 1965 of the United States District Court for the Northern District of Georgia, Gainesville Division, before the Honorable Sidney O. Smith, Jr., there came on for trial the case of the United States of America versus Richard Lamar Patterson same being a four-count indictment wherein said Defendant was accused of unlawfully, willing and knowingly have in his possession, custody and control a still and distilling apparatus set up

without having same registered as required by law and other offenses against the United States of America.

To the said indictment, the Defendant pleaded not guilty, and at the same term of Court the said case proceeded to trial. After all evidence, both oral and documentary was presented by the United States of America and the United States of America closed, Appellant's attorney made an oral motion to suppress all evidence presented by the United States of America on the grounds that the witnesses of the United States of America were not armed with a legal search warrant as required by law and that the alleged evidence obtained was a direct result of an illegal search. This motion was denied and after the Defendant had closed, and the Jury charged by the Court, the Jury returned a verdict finding the Appellant, Richard Lamar Patterson, guilty on Count One (1), the possession count, without having same registered as required by law; guilty on Count Two (2), carrying on a business of a distiller of spiritous liquor without having given bond as required by law; guilty on Count Three (3), possessing liquors without having affixed to the containers thereof, stamps evidencing the determination of the tax on said distilled spirits and guilty on Count Four (4), having and possessing property, the same property being intended for the use in the manufacture and production of non tax paid distilled spirits, and in due course the Appellant was sentenced by the Court.

During the course of the trial, the United States of America presented two witnesses by the names of Billy H. Moore and Frank O. Frazier. These witnesses testified that they were agents of the United States Treasury Department, the Alcohol and Tobacco Tax Unit, and as such took part in the search and arrest of the Appellant. Said witnesses stated on cross-examination that they did not have a search warrant and no reason was offered for not obtaining a search warrant and having it in their possession and served upon Appellant at the time search was made on the premises of the Appellant. The Court admitted in evidence the testimony of these witnesses

over objection of the attorney for Appellant. No testimony from any of the United States' witnesses placed the Appellant at the still site or in possession of distilling apparatuses and in possession of illegal spirits or in possession of the premises on which non tax paid spirits were found.

After the verdict of guilty was rendered, as aforesaid, and within the time prescribed by law, Appellant, Richard Lamar Patterson, filed his appeal to the United States Court of Appeals for the Fifth Circuit for review. The United States Court of Appeals for the Fifth Circuit rendered the opinion appended hereto and, in due course, motion for rehearing was filed and denied. The case is now before this Court for review.

(f)

ARGUMENT IN SUPPORT OF ALLOWANCE OF THE WRIT

The illegal search and seizure here in question was instigated by agents of the United States Treasury Department, Alcohol and Tobacco Tax Unit, and from the record in the case, it was evident that they had been making an investigation of the premises immediately surrounding Appellant's home and out buildings and had been doing so for a considerable time, however, they made no attempt to arm themselves with a search warrant and gave no reason for not having done so in the trial of the case. Search without a warrant is not justified merely because facts exist which would be sufficient for the issuance of a warrant.

The United States Court of Appeals for the Fifth Circuit in rendering its opinion holding that there was not an illegal search and seizure, failed to recognize that the decision was in direct conflict with the case of Johnson versus United States, 68 S. Ct. 367-369, and Baysden versus United States, 4 Cir. 271 F. 2d 325,

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the descretion of police officers."

On April 3, 1961, in the case of Chapman versus United States, 181 S. Ct. 776, this Court cited **Johnson** with **approval** and thereafter in Baysden versus United States, 4 Cir. 271 F. 2d 325, the Fourth Circuit referred to the decision of this Court **re-affirmed** the ruling in Johnson stating:

> "The point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officers engaged in the often competitive enterprise of ferreting out crime."

Not persuaded by these authorities, the United States Court of Appeals for the Fifth Circuit ruled in this case that there was not an illegal search.

The opinion of the United States Court of Appeals for the Fifth Circuit in holding that there was sufficient evidence to warrant a conviction fails to recognize prior decisions of this Court and is direct conflict with this Court's decision in the case of United States versus Romano, 86 S. Ct. 279, wherein this Court held:

> ". . . that statute providing that the presence of defendant at site of illegal still shall be deemed sufficient evidence to authorize conviction for possession, custody and control of illegal still, unless defendant explains such presence to satisfaction of jury, was **unconstitutional.**"

In the case before this Court, the Appellant was not seen or found at the alleged still site by the arresting officers and evidence submitted only inferred guilt of the Appellant and there was no evidence submitted by the United States of America that directly connected the Appellant with the operation of the alleged still and this Court so held in the case of the United States versus Romano, 86 S. Ct. 279:

> "In absence of some showing of defendant's function at operating still, connection of defendant's presence there with possession of illegal still is too tenuous to permit reasonable inference of guilt."

CONCLUSION

The judgment of the trial Court was in error and it should have been reversed by the Court of Appeals. For the reasons stated herein, this Court should grant the Writ of Certiorari and reverse the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully Sumbitted,

Frank B. Stow

FRANK B. STOW
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing petition of Richard Lamar Patterson were this date deposited in the United States post office, Gainesville, Georgia, with air mail postage prepaid, addressed as follows: Solicitor General, Department of Justice, Washington 25, D. C., and Charles B. Lewis, Jr., Assistant United States Attorney, P. O. Box 912, Atlanta, Georgia.

This 1ST day of December, 1966.

Frank B. Stow

FRANK B. STOW
Counsel for Petitioner

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23180

RICHARD LAMAR PATTERSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(October 3, 1966.)

Before RIVES, BELL, and THORNBERRY,
Circuit Judges

PER CURIAM: This is an appeal from a judgment entered after a jury verdict of guilty on a four count indictment charging appellant with having violated the internal revenue laws relating to illicit distilled spirits. 26 USCA, §§ 5179(a); 5205(a)(2); 5601(a)(1), (4); 5604(a)(1); and 5686.

The record demonstrates a sufficiency of evidence to warrant the conviction; no illegal search; and no error in admitting a prior felony conviction, after appellant testified, for purposes of impeachment.

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23,180

RICHARD LAMAR PATTERSON,
Appellant.

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING (November 4, 1966)
Before RIVES, BELL, and THORNBERRY,
Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby

DENIED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23,180

RICHARD LAMAR PATTERSON,
Appellant.

versus

UNITED STATES OF AMERICA,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from November 4, 1966; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from November 4, 1966 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that Certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from November 4, 1966, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ GRIFFIN B. BELL,
United States Circuit Judge.

(ORIGINAL FILED — NOVEMBER 15, 1966)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1966

No. 23,180

D. C. Docket No. CR 5446

RICHARD LAMAR PATTERSON,
Appellant.

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before RIVES, BELL and THORNBERRY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 3, 1966.

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 819

RICHARD LAMAR PATTERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Northern District of Georgia of violations of the liquor laws. On November 4, 1965, he was given a general sentence of imprisonment for two years. The court of appeals affirmed the conviction *per curiam* (Tr. 125).

Two agents of the Alcoholic and Tobacco Tax Division testified that on April 19, 1965, agent Billy Moore conducted a general survey of the countryside near petitioner's residence, and that he discovered two stills. One ("Still No. 1") was located approximately 300 yards northeast of petitioner's residence, and the other ("Still No. 2"), approximately 150 yards southeast of the residence (Tr. 16–17). A footpath ran from Still No. 2 (which was not, at that time, operational) to the kitchen door of petitioner's residence. There was no other path to the site (Tr. 17).

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Still No. 1, when found, was still warm from use. A mule and cart track ran from that still to an abandoned house used by petitioner as a barn, outside of which were found petitioner's mule and cart. There were no other approaches leading to the site. On that path, Moore found thirty-six gallons of whiskey, upon none of which were affixed the proper revenue stamps (Tr. 16–18).

When Moore initially discovered the illegal stills, he radioed for the assistance of other agents (Tr. 16). Shortly thereafter petitioner returned to the area, and agent Frazier, in response to Moore's radio message, pulled his car behind that of petitioner. Frazier noticed three cases of fruit jars in the back seat of petitioner's car. Petitioner was arrested and told that he was entitled to counsel, and that any statements he made might be used against him. Petitioner denied possession or ownership of the illegal stills. He said that he knew that the stills were being worked through his yard (Tr. 20–24).

After the arrest, the cases of fruit jars were removed from petitioner's vehicle. Two of these cases contained used jars which smelled of whiskey (Tr. 25). Similar jars and gallon jugs were found concealed in junk automobile bodies lying around the outside of petitioner's abandoned house (Tr. 25–26, 52). Also found in an abandoned automobile was a burlap bag containing 25 pounds of barley malt (Tr. 52).

At the conclusion of the government's case, petitioner moved to suppress all testimony relating to articles found on the grounds of illegal search and seizure. The motion was denied (Tr. 65).

Petitioner testified that he purchased the jars, which were to be used for canning food, from a Mrs. James in Clayton, Georgia, and that the barley malt was used only for feeding his chickens.

1. There is no merit to petitioner's argument that the evidence against him was obtained by an illegal search and seizure. No constitutional rights of petitioner were violated when agent Moore discovered the illegal stills and whiskey in the nearby field. *Hester* v. *United States,* 265 U.S. 57; *United States* v. *Whitmore,* 345 F. 2d 28 (C.A. 6), certiorari denied *sub nom. Anderson* v. *United States,* 382 U.S. 991; *United States* v. *Hassell,* 336 F. 2d 684 (C.A. 6), certiorari denied, 380 U.S. 965; *United States* v. *Myers,* 329 F. 2d 280 (C.A. 3). Nor were his rights violated when agent Frazier observed the fruit-jar cases in the back seat of petitioner's car. See *United States* v. *Lee,* 274 U.S. 559, 563; *Haerr* v. *United States,* 240 F. 2d 533, 535 (C.A. 5).; *Ellison* v. *United States,* 206 F. 2d 476 C.A.D.C.).

After observing the two illegal stills, from which the only approaches led to petitioner's property, the agents had sufficient probable cause to place petitioner under arrest and to seize the jars on the back seat of his car, which had been discovered at the time of his arrest. The removal of the fruit jars and barley malt from the abandoned automobile bodies strewn about petitioner's property also involved no entry into a constitutionally protected area. See *Hester* v. *United States, supra.*[1]

[1] Although the agents admitted searching the abandoned house used as a barn, the record, which is not completely clear, does not show that any evidence introduced at the trial was obtained during that search. Agent Moore testified that some

2. Petitioner's challenge to the sufficiency of the evidence is unwarranted. Petitioner's possession of the illegal still, non-tax-paid whiskey, and raw materials may be proved circumstantially, *United States* v. *Burch*, 313 F. 2d 628 (C.A. 6), as may petitioner's carrying on of the business of a distiller. Cf. *United States* v. *Gainey*, 380 U.S. 63. That petitioner was not found directly at the still sites is of no moment. The record overwhelmingly supports a finding that petitioner had effective possession of the still.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General,
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

FEBRUARY 1967.

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jars were set in front of the door (Tr. 26), but it is not clear whether these jars were removed from the barn or from somewhere else. Nor is it clear whether these jars were used for bottling moonshine whiskey or for canned foodstuffs (See Tr. 55).

[2] Petitioner's reliance on *United States* v. *Romano*, 382 U.S. 136, is misplaced. In that case, this Court held unconstitutional the legislative presumption (26 U.S.C. 5601(b)(2)) that "possession, custody, or control" of a still or distillery apparatus may be presumed from proof of the accused's presence at the still site. In the instant case, however, this legislative presumption was not charged to the jury, and the conviction was based upon overwhelming circumstantial evidence.

U.S. GOVERNMENT PRINTING OFFICE: 1967